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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1024

CITIZENS FOR PARENTAL RIGHTS, et al.,
Appellants,

vs.

SAN MATEO COUNTY BOARD OF EDUCATION, et al.,
Appellees.

On Appeal from the Supreme Court of the State of California

MOTION TO DISMISS

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VS.

SAN MATEO COUNTY BOARD OF EDUCATION, et al.,
Appellees.

On Appeal from the Supreme Court of the State of California

MOTION TO DISMISS

Appellees, *San Mateo County Board of Education, et al.,* move to dismiss the appeal herein pursuant to Rule 16 of the Rules of the Supreme Court of the United States on the grounds that the questions presented are so unsubstantial as not to need further argument, and that the decision below is so obviously correct as to warrant no further review.

I. INTRODUCTORY STATEMENT

Appellants, *Citizens for Parental Rights, et al.,* appeal from a decision by the California Court of

Appeal in *Citizens for Parental Rights v. San Mateo County Bd. of Education* (1975), 51 C.A.3d 1. In *Citizens,* the Court of Appeal held that the implementation of family life and sex education programs by several school districts in the jurisdiction of the appellee, *San Mateo County Board of Education,* did not violate the appellants' constitutional rights under the First, Ninth, Tenth, and Fourteenth Amendments of the U. S. Constitution and the parallel provisions of the California Constitution. The Court of Appeal further held that the excusal provisions of California Education Code Sections 8506 and 8701[1] are consti-

[1]At all relevant times herein, Education Code Section 8506 provided:

> No governing board of a public elementary or secondary school may require pupils to attend any class in which human reproductive organs and their functions and processes are described, illustrated or discussed, whether such class be part of a course designated "sex education" or "family life education" or by some similar term, or part of any other course which pupils are required to attend.
>
> If classes are offered in public elementary and secondary schools in which human reproductive organs and their functions and processes are described, illustrated or discussed, the parent or guardian of each pupil enrolled in such class shall first be notified in writing of the class. Sending the required notice through the regular United States mail, or any other method which such local school district commonly uses to communicate individually in writing to all parents, meets the notification requirements of this paragraph.
>
> Opportunity shall be provided to each parent or guardian to request in writing that his child not attend the class. Such requests shall be valid for the school year in which they are submitted but may be withdrawn by the parent or guardian at any time. No child may attend a class if a request that he not attend the class has been received by the school.
>
> Any written or audiovisual material to be used in a class in which human reproductive organs and their functions and processes are described, illustrated, or discussed shall be available for inspection by the parent or guardian at reasonable times and places prior to the holding of a course which includes such classes. The parent or guardian shall be notified in writing of his opportunity to inspect and review such materials.
>
> This section shall not apply to description or illustration of human reproductive organs which may appear in a textbook, adopted pursuant to law, on physiology, biology, zoology, general science, personal hygiene, or health.
>
> Nothing in this section shall be construed as encouraging the description, illustration, or discussion of human reproductive organs and their functions and processes in the public elementary and secondary schools.
>
> The certification document of any person charged with the responsibility of making any instructional material available for inspection under this section or who is charged with the responsibility of notifying a parent or guardian of any class conducted within the purview of this section, and who knowingly and willfully fails to make such instructional material available for inspection or to notify such parent or guardian, may be revoked or suspended because of such act. The certification document of any person who knowingly and willfully requires a pupil to attend a class within the purview of this section when a request that the pupil not attend has been received from the parent or guardian may be revoked or suspended because of such act.

Section 8701 provided:

> Whenever any part of the instruction in health, family life education, and sex education conflicts with the religious training and beliefs of the parent or guardian of any pupil, the pupil, on written request of the parent or guardian, shall be excused from the part of the training which conflicts with such religious training and beliefs.
>
> As used in this section, "religious training and beliefs" includes personal moral convictions.

tutional. For the reasons which follow, we contend that the appellate court's decision is correct and no further review by this Court is warranted.

II. STATEMENT OF THE CASE

The facts and procedural history of this case have been summarized by the Court of Appeal and need not be repeated here. (See *Citizens, supra,* 51 C.A.3d at pp. 7-10.) Following the decision in the Court of Appeal and denial of appellants' petition for rehear-

ing in that court on September 26, 1975, appellants petitioned for a hearing in the California Supreme Court. On October 23, 1975, the Supreme Court unanimously denied the petition, and this appeal followed.[2] It should be noted that appellants have filed both an appeal under 28 U.S.C. 1257(2) and 28 U.S.C. 1257(3), and, "on a corollary basis" a petition for writ of certiorari. (Appellants' Jurisdictional Statement, pp. 3-4, hereafter referred to as "J.S."). Our arguments herein are intended to respond to both forms of relief sought by appellants.

III. QUESTIONS PRESENTED

Whether the amended complaint stated a cause of action?

a. Whether the family life and sex education courses sought to establish a religion?

b. Whether the excusal statutes vitiated appellants' claim regarding the Free Exercise Clause and claims relating to right to privacy?

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[2]The denial of a hearing in the Supreme Court is an indication that California's highest court found appellants' argument unconvincing. See *DiGenova v. State Board of Education* (1962), 57 C.2d 167, 178 ("Although this court's denial of a hearing is not to be regarded as expressing approval of the propositions of law set forth in an opinion of the District Court of Appeal or as having the same authoritative effect as an earlier decision of this court, • • • it does not follow that such a denial is without significance as to our views • • •"); see also *Barry v. Dept. of Public Works* (1962), 199 C.A.2d 359, 360, 18 Cal.Rptr. 637, ("The Supreme Court having considered the same arguments which are now made to us, and having, by denial of hearing, apparently found them unconvincing, the appellants here are asking us not only to overrule the District Court of Appeal • • • but also effectively to overrule the Supreme Court This we cannot do.")

IV. DISCUSSION

Appellants' argument may be summarized as follows. First, appellants contend that the Court of Appeal erred by concluding excusal statutes provide a defense to their asserted claim of unconstitutionality. (J.S., pp. 11-12). Second, they contend the court erred in concluding that the excusal statutes are constitutional on their face without factual inquiry. (J.S., p. 12). Third, appellants contend that the excusal of students, by itself, may create discrimination through "State centered pressure and coercion," and that a factual inquiry was also necessary on this issue. (J.S., pp. 12-13). Fourth, they contend that in upholding the constitutionality of the excusal statutes, the court below erred by failing to apply the standard of review articulated in *Wisconsin v. Yoder* (1972), 406 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526. (J.S., pp. 13-14). Finally, appellants argue that judicial restraint in educational matters must give way in this controversy where First Amendment freedoms versus the state's powers are involved.

Appellants' argument is without merit.

THE COURT OF APPEAL CORRECTLY HELD THE COMPLAINT HERE FAILED TO STATE A CAUSE OF ACTION

Appellants argue that the court below erred by upholding the dismissal of its complaint without a factual inquiry. They contend that the complaint sufficiently alleged a number of substantial constitutional questions. (J.S., p. 25).

The Court of Appeal summarized the allegations of the many pleadings comprising the complaint as follows:

> * * * 1) the county's Family Life Education Program (hereafter program) interfered with the parents' and the students' free exercise of religion; 2) the program was not neutral but, in fact, established a new and different religion; 3) the excusal system, pursuant to Education Code sections 8506 and 8701 did not, in fact, exist and even if an excusal system were in force, it is unconstitutional as it is discriminatory and deprives the parents and students of equal protection and due process; 4) the excusal system of Education Code sections 8506 and 8701 had elements of coercion that violate the Free Establishment Clause; 5) as the program interfered with the right of parental control, it deprived the parents and students of life, liberty and the pursuit of happiness; 6) as to the right of privacy, the program deprived the parents of their right of privacy, the program deprived the parents of their right to control the education of their children in matters relating to marriage, the family, marriage and sex, and also deprived the students of privacy of mind as they were forced to reveal their innermost personal and private feelings and the intimate details of family life to teachers and fellow students; and 7) the program also deprived both the parents and students of equal protection, as well as procedural and substantive due process.
>
> (*Citizens, supra,* 51 C.A.3d, pp. 10-11, fn. omitted)

It is, of course, a fundamental rule of pleading that ultimate facts, rather than conclusions of law, must be plead in order to state a cause of action. (California Code of Civil Procedure §425.10(a); *Green v. Palmer* (1860) 15 C. 411, 414; *Vallindras v. Massachusetts etc. Ins. Co.* (1954) 42 C.2d 149, 151, 265 P.2d 907 (Allegation in complaint for false imprisonment that sheriff "did unlawfully imprison plaintiff" held conclusion of law and insufficient.)). Here, as the Court of Appeal noted, "* * * the mere pleading of the unconstitutionality of the program and statutes in issue is not sufficient to overcome the dismissal of their complaint based on its failure to raise any substantial constitutional questions as a matter of law." (*Citizens, supra,* 51 C.A.3d at p. 11).

1. The family life and sex education courses involved here do not seek to establish any religious concept.

Analysis of the decision by the Court of Appeal reveals that one of its major premises is that the family life and sex education courses involved here simply do not relate or seek to establish any religious concept or belief. Rather, the programs involve education and public health in which the state has a legitimate and compelling interest. (*Citizens, supra,* 51 C.A.3d at pp. 21-27).

While appellants alleged the courses were designed to establish a religion, they failed to allege any material facts to support their conclusionary allegation.[3]

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[3]The complaint and all amendments thereto are included in the Clerk's Transcript on Appeal, hereafter referred to as "C.T."

(J.S., p. 24, C.T. 154). Thus, for example, the amended complaint alleged that portions of courses were designed to "establish new or different religious and spiritual practices and beliefs that are promulgated by the State through its public school system, as illustrated by items contained in Exhibit 'E' * * *." (C.T. 154). Exhibit E, in turn, consists of one of the teacher program guides. (C.T. 209; described in *Citizens, supra,* 51 C.A.3d pp. 7-10).

Several points can be made here. First, this kind of "inferential pleading" has been soundly criticized by the California courts. (See, e.g., *California Trust Co. v. Gustason* (1940) 15 C.2d 268, 272 (notice of rescission, attached as exhibit, held insufficient to alleged fraud in quiet title suit; "* * * it is not the duty of a court to ferret out necessary elements of a cause of action or defense by referring to exhibits attached to a pleading."); see also *McClellan v. State of California* (1932) 119 C.A. 535, 537 (complaint to recover taxes; failure to allege illegal method of collection not cured by reference to written protest attached as exhibit); *Hayt v. Bentel* (1913) 164 C. 680, 686 (attaching contract not equivalent to averment of facts therein)). The rationale of these decisions which refuse to give effect to inferential pleading is that a pleader, unable to make a direct allegation, cannot merely hint at a cause of action that he does not have. Here, by referring the court to Exhibit E, appellants purport to allege facts showing how the program established a religion. However, as discussed below, no such facts existed.

Secondly, and more importantly, the trial court, the Court of Appeal, and the California Supreme Court had before them all of the exhibits attached to the pleadings. None of those tribunals could find *any* material facts to show how the courses in any way attempted to establish a religion. As stated by the Court of Appeal:

> In the instant case, the primary focus is on the second test as the parents alleged that the program "establishes new or different religious and spiritual practices and beliefs," as the program treats matters of morality, family life and reproduction in a manner that is hostile to their theistic religion. Although the pleadings are lacking in specificity, we glean from the exhibits and the briefs that the parents' complaint refers to the fact that, among others, the program deals with subjects such as abortion, birth control, divorce and masturbation. Our examination of these documents indicates that most of these sensitive areas are carefully delineated with cautionary instructions to the teachers to indicate that a variety of beliefs and practices exist. The teachers are also instructed to refer their students to their parents and religious counselors for guidance and information as to specifics. For example, under the subject of birth control, all present day methods are listed. Thus, there is evidence of neutrality in the religious sphere and ample support as a matter of law for the trial court's finding that the subjects are not covered from a religious point of view, but simply as public health matters.
>
> (*Citizens, supra,* 51 C.A.3d at p. 21, fn. omitted)

And, again:

> We agree with the trial court's conclusion of law that the portions of the program challenged simply do not relate to, or seek to establish any religious concept, dogma, idea and precept; nor does the program involve the county school system directly, indirectly or substantially in any way in the establishment of a "religion," or the exercise thereof, or in favoring one religion over another, or for that matter, any particular religion. The program areas that the parents challenge are simply not religious in nature but primarily involve education and public health. The fact that the parents possess certain ideas or views concerning family life relationships and sex which are based on moral standards that are the outgrowth of their religious principles does not make the teaching of sex education and family life religious in nature, nor does it constitute the establishment of a religion in the public schools. Thus, the trial court properly concluded that the complaint alleged no triable factual issues as to these matters.
>
> (*Citizens, supra,* 51 C.A.3d at p. 24)

Nor did appellants allege a single fact to show a particular teacher or administrator in the respondent schools violated the legitimate secular purposes of these courses, through conscious design or otherwise, by permitting religious activities to seep into or permeate the curriculum. (See *Hopkins v. Hamden Board of Education,* 29 Conn.Supp. 397, 289 A.2d 914, 923; *Citizens, supra,* 51 C.A.3d at pp. 21-23.)

The emphasis upon the social and secular aspects of the topics considered, the neutrality of courses *vis-a-vis* religion, the recognition that a variety of beliefs exist, and that the student's parents and/or religious counselor should be consulted as to specifics (*outside* the classroom) and the absence of facts showing improper implementation, all refute appellants' assertion that these courses establish a new and different religion.

Appellants' subjective predilections concerning the educational programs involved here cannot be transformed into constitutional issues merely by pleading them as allegations in a complaint. As succinctly stated by the court below:

> Any other approach would permit any group of parents or students to create chaos in the school system by attempting to enjoin any portion of a school curriculum that allegedly did violence to or interfered with any religious belief. Thus, parents and students whose religious beliefs prohibited the consumption of certain kinds of (or any) meat could interfere with and negate those aspects of a curriculum in nutrition that suggested meat as a good source of protein. Thus, there is no basis for the argument that the program in effect establishes a "religion of secularism" in the schools (cf. *Abington School Dist. v. Schempp,* 374 U.S. 203, at p. 225 [10 L.Ed.2d 844, at pp. 859-860]).
>
> (*Citizens, supra,* 51 C.A.3d at p. 25)

2. The broad excusal statutes vitiate appellants' contentions regarding the Free Exercise Clause and rights of privacy, "parently authority", and the asserted exclusive right to teach family life and sex education at home.

The Court of Appeal found that the excusal sections, Education Code Sections 8506 and 8701, negated appellants' claims of invasion of privacy and their assertions about parental authority. In attempting to escape the logic of the court's decision, appellants misconstrue the court's holding. Appellants argue that the court erred by concluding the excusal statutes provide a defense to the claim of unconstitutionality, citing *School District of Abington Tp., Pa. v. Schempp* (1963) 374 U.S. 203, 10 L.Ed.2d 844, 83 S.Ct. 1560. (J.S., pp. 11-12). Appellants are confused. *Abington* involved the reading of the Bible and prayers at the beginning of each school day, which the court held violated the Establishment of Religion Clause. Here, in our case, the court relied upon the excusal statutes in holding there was no coercion and thus no violation of the Free Exercise Clause, stating:

> In sum then, the direct answer to the parents' contentions concerning free exercise is that the program against which the parents seek a permanent injunction is not compulsory as Education Code sections 8506 and 8701 provide that the student may be excused from any part that conflicts with the parents' religious beliefs or that uses materials to which the parents object. However, even assuming an infringement for the sake of argument, the incidental burden is justified by the compelling state interest in education. (citations)
>
> (*Citizens, supra,* 51 C.A.3d at p. 19)

V. CONCLUSION

An overview of this entire case indicates the correctness of the trial court's observation that the appellants "simply seek to permanently and totally enjoin sex education in the public school system." (Decision on Motions to Dismiss and Inspection of Documents, p. 11, attached hereto as an Appendix). Such a drastic remedy in a situation where an educational program with secular objectives incidentally offends the beliefs of a particular religious group has never been required by this Court.

For example, in *West Virginia Board of Education v. Barnette* (1943) 319 U.S. 624, 87 L.Ed. 1628, 63 S.Ct. 1178, 147 A.L.R. 674, while the court held that those objecting on religious grounds to compulsory flag salute ceremonies could not be required to participate in them, it did not hold that the ceremonies had to be abolished. Moreover, if a court did abolish sex education courses because such courses incidentally offend religious beliefs, that decision would arguably violate the establishment clause. In *Epperson v. Arkansas* (1968) 393 U.S. 97, 21 L.Ed.2d 228, 89 S.Ct. 266, the Court struck down, on the basis of the establishment clause, an Arkansas statute which prohibited the teaching of evolution in the public schools. The Court stated that "[t]here is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." (*Epperson, supra,* 393 U.S. at 106). Thus, under *Epperson,* the state is

required to plan its curriculum primarily on the basis of educational considerations and without reference to the religious sensibilities of any particular individual or group. We submit the decision in this case is consistent with the principles of *Barnette* and *Epperson*.

For the foregoing reasons, appellees respectfully urge that the judgment below be affirmed.

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Dated, March 12, 1976.

(Appendix Follows)

APPENDIX

Appendix

In the Superior Court of the State of California
In and for the County of San Mateo

No. 139710

Citizens for Parental Rights, an unincorporated association,	Plaintiffs,
vs.	
San Mateo County Board of Education, et al.,	Defendants.

[Filed Jan. 9, 1973]

DECISION ON MOTIONS TO DISMISS AND INSPECTION OF DOCUMENTS

The defendants duly noticed a motion to dismiss the within action brought by the plaintiffs, and at the same time, the plaintiffs duly noticed a motion for an order requiring inspection and copying of documents and records, and the same came on regularly for hearing before the court, present for the plaintiffs was Mr. Robert Damir, and for the defendants, Mr. Keith C. Sorenson, District Attorney of San Mateo County, by Gerald Coleman, and said matters were duly argued and thereafter submitted for decision, it is the decision of the court as follows:

1. The court has reviewed the various pleadings filed by the parties in connection with this matter, and concludes that plaintiffs simply failed to allege a basis for relief against the defendants and by reason of the court's decision in this regard, dismissing the same plaintiffs' motion for inspection of records and production of documents is necessarily denied.

The court has noted that the defendants' demurrer to the first amended complaint was overruled as to certain causes of action in 1968, and that the defendants' motion for summary judgment on July 9, 1969 was denied, along with the denial of a judgment on the pleadings, and again, the defendants' demurrer to the first amended complaint and to amendments to the first amended complaint were likewise overruled on March 3, 1971, along with a defendants' motion for judgment on the pleadings on January 13, 1972. The plaintiffs now vigorously assert that the defendants' motion to dismiss must be considered as a motion for summary judgment and since another judge prior to this time denied such a motion, it would be improper for this court to consider such a motion and that the ruling of the prior judge should necessarily be followed.

This court quite agrees with the quote from 48 Corpus Juris Secundum, Section 56, which states in part "as a general rule, a successor judge cannot—review, modify or reverse—the final orders of his predecessor, especially orders which are rendered at a past term."

First, it is to be noted that the motion to dismiss before this court, is not a review, modification or a reversal of any final judgment made by a prior judge in connection with this matter. It is true that on February 17th, Judge Branson took under submission a motion for judgment on the pleadings, and on February 24, 1972, summarily denied that motion without opinion. Thereafter, the case was calendared for setting and a pretrial conference was held before the Honorable G. Brooks Ice on October 18, 1972, who thereafter filed a pretrial conference order setting forth with great particularity the contentions of the parties and specifically enumerating on Page 5 of his pretrial conference order that all law and motion was completed with the exception of a motion of defendants to dismiss the action. As stated in Judge Ice's pretrial conference order, this is basically "an action for declaratory relief that the Family Life Education Course of Study is unconstitutional because it is designed to or encourages questioning of parental authority, requires, encourages and persuades pupils to reveal personal family matters to teachers and others, usurps parental authority and guidance in teaching of children concerning matters related to discipline, sexual matters, marital relations and family life, is designed to question, prohibit and interfere with free exercise of existing religious and spiritual practices and beliefs, deprives pupils of the right to liberty and happiness, and because the authoring of the Family Life Education Program subject to the right of parents or guardians to have

their children or wards removed as provided in Section 8506 of the Education Code is a denial of equal protection and discriminatory. The constitutional provisions relied on by plaintiffs are Article I, Section 1 of the California Constitution (Inalienable Rights of Life, Liberty and Happiness), the First Amendment of the United States Constitution (Freedom of Religion), the Ninth and Tenth Amendments of the United States Constitution (affect of an enumeration of rights and powers reserved to the people) and Section 1 of the Fourteenth Amendment of the United States Constitution (privileges and immunities and equal protection of the laws)." Further, "injunctive relief to prevent defendants from using, encouraging, developing, adopting or engaging in many other types of activities with respect to the family life education course of study, including the expenditure of funds therefor, for the same reasons for which declaratory relief is sought and set forth above."

Upon the hearing of the oral argument in connection with the defendants' motion to dismiss, plaintiffs' counsel readily concedes that since the filing of its first amended complaint the California State Legislature enacted into law Section 8506 of Education Code concerning sex education or family life education. In substance, that section simply provides that no governing board of a public elementary or secondary school in the State of California *may require* pupils to attend any class which involves sex education or family life education. On the other hand, if

such classes are in fact to be offered in the public elementary and secondary schools, the parent or guardian of each pupil enrolled in such class shall first be notified in writing of the class. Such notice is required to be sent through the regular United States mail to all parents. Each parent is to be provided the opportunity to request in writing that his child shall not attend the class and further no child may attend such a class if a request that he not attend the class has been received by the school. The Education Code further provides that any written or audio-visual material to be used in such a class shall be made available for inspection by the parent or guardian of such child at reasonable times and places prior to the holding of such a class and the parent or guardian shall further be notified in writing of his opportunity to inspect and review the materials. A careful review of the plaintiffs' pleadings and amendments thereto make it clear that in each instance each contention or so-called "right", has its foundation allegedly guaranteed by the Constitution of the United States and Article I, Section 1, of the Constitution of California. This court squarely holds that the plaintiffs' complaint simply fails to raise any substantial question as to the constitutionality of the courses and teachings being offered in the public schools of the defendants. The court arrives at this conclusion construing all of the allegations of the plaintiffs' complaint in a light most favorable to them for the following reasons. With respect to the various allegations which are alleged to violate First Amend-

ment freedoms of the United States Constitution, the plaintiffs, in substance, allege that first, their personal religious beliefs and the free exercise thereof are interfered with by the teaching of such courses. The obvious answer to this contention lies in the fact that the students attending the schools of the defendants have the clear right to withdraw from such classes and for that matter to not even participate in the same from their inception. Thus, the interference, if any, with the plaintiffs' personal religious beliefs and the free exercise thereof, whether it applies to the plaintiffs or their children, can only arise if the material taught is in fact contrary to their particular religious beliefs and further, if the plaintiffs voluntarily elect to expose the minds of their children to such a course.

If on the other hand, the plaintiffs contend that the curriculum and material being taught in the challenged courses are contrary to their particular religious beliefs and even though their children are not required to attend such courses, they still have a constitutional right to have such material conform to their religious beliefs, then clearly there is no such constitutional right. If such were not the case, it is obvious that every citizen could seek to control the curriculum and material being taught in our public school system by simply asserting that such material was contrary to their particular religious beliefs. Thus various complainants could actually use the judicial process to in fact "establish a religion", in our public school system by using the courts to so control cur-

riculum to ensure that the same would conform to the particular religious concepts of the complainants. It is simply not for the courts in the constitutional sense to order conformity or limit non-coformity and thereby ensure that the limits of the curriculum subject matter will coincide with a particular religious point of view.

Plaintiffs next contend that the activities of the defendants with respect to courses of study interfere with plaintiffs' freedom to teach spiritual and religious practices to their children.

As heretofore pointed out, the obvious answer to this contention lies squarely in the fact the plaintiff's children are not compelled to attend such classes and a simple request after due notice automatically removes said child from such a course of study and vests in the plaintiffs as parents or guardians exclusive freedom to teach such spiritual and religious practices as they may deem appropriate to their children.

Plaintiffs further assert that contrary to the First Amendment of the United States Constitution, the activities of the defendants deprive plaintiffs and their children who are attending public elementary schools of their rights to liberty and happiness and such conduct usurps parental authority.

These contentions are totally without merit since they presuppose that the legislature and the defendants may not make available various courses of studies to all students upon an elective or withdrawal basis.

As previously pointed out, plaintiffs' children are not compelled to attend such classes and if there is parental objection may summarily withdraw from the same. The Constitution of the United States does not vest in objectors the right to preclude other students who may voluntarily desire to participate in a course of study under the guise that the objectors' liberty, personal happiness or parental authority is somehow jeopardized or impaired. To adhere to such a concept, would immediately vest a so-called right to use judicial constitutional authority to limit inquiry to conformity and knowledge to the known. In the case of *Wisconsin v. Yoder,* 406 U.S. 205, decided on May 15, 1972, the United States Supreme Court speaking through Chief Justice Burger stated "Our disposition of this case, however, in no way alters our recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discreet aspects of a state's program of compulsory education. *This should suggest* that courts must move with great circumspection in performing the sensitive and delicate task of weighing a state's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements."

This leads to the plaintiffs' next contention that the curriculum being taught by the defendants assertedly establishes a new and different religious and spiritual practice and belief contrary to the plaintiffs' rights as guaranteed by the First Amendment of the United States Constitution.

Basically, the plaintiffs contend that the teaching of the challenged courses by the defendants in the area of sex education and family life constitutes an establishment of religious and spiritual practices and beliefs which is prohibited by the First Amendment to the United States Constitution.

In *Everson v. Board of Education,* 330 U.S. 1, 67 Sup. Ct. 504, the Supreme Court of the United States stated "Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."

As said in *Epperson v. Arkansas,* 393 U.S. 97, 89 Sup. Ct. 266, "Judicial interposition in the operation of the public school system of the nation raises problems requiring care and restraint . . . . By and large, public education in our nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply indicate basic constitutional values." The court in the *Epperson* case pointed out that the state may neither prefer any religion nor prohibit any theory just because it be deemed antagonistic to the principles or prohibitions of any religious sect or dogma.

Examining the plaintiffs' pleadings and the various constitutional allegations sought to be asserted, it is clear to the court that the activities being challenged by the plaintiffs simply do not relate to nor seek to establish any religious concept, dogma, idea, precept

nor does the particular curriculum involve the defendants directly, indirectly or substantially in any way in the establishment of a "religion", or the exercise thereof, or in favoring one religion over another, or for that matter any particular religion. The area which the plaintiffs seek to challenge, is simply not religious in nature, but is simply one involving public health.

As said in the case of *Prince v. Massachusetts,* 321 U.S. 158, the state's interest in the health of its children outweighs claims based upon religious freedom and the right of parental control. The court stated "a democratic society rests . . . upon the healthy, well-rounded growth of young people into full maturity as citizens . . . . It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action." This conclusion when tested against the so-called constitutional assertions urged in this matter by the plaintiffs, is further fortified by the very fact that the plaintiffs' children simply do not have to participate in the program if such is their choice. The fact that the plaintiffs or any individual possess certain ideas or views respecting sexual matters and family life relationships which are founded on their moral standards which are the outgrowth of their religious principles does not make the teaching of sex education and family life courses either religious in nature or constitute the establishment of a religion in the public schools.

This court concludes that the legislature of the State of California has the authority both under the State and Federal Constitutions to lawfully enact Section 8506 of the Education Code and the governing boards of the public elementary and secondary schools of this state may establish designated sex education or family life education programs to be made available to the students attending such schools in this state without runnning afoul of the free exercise or establishment clauses of the constitution.

It is not necessary for this court to pass on the question of whether or not the legislature and necessarily the various governing boards of the secondary and elementary school districts in this state could compel attendance to such programs contrary to parental wishes since the legislature in its wisdom has elected to create an excusal system in deference to the religious convictions of parents or guardians who might otherwise object. Thus, the legislature has not seen fit to demean the state's compelling interest in the subject matter and the state's concern for the health and well-being of the young people of this state, but has elected to provide on an individual choice basis the final decision with the parent or guardian of such child who might be exposed to such courses to exclude their children from such exposure in the public school system after individual parental evaluation of the material being offered. The argument that forcing an election on the part of the parent results in discrimination or undue social pressure upon those students who may elect not to participate is without merit.

Next, the plaintiffs assert by their complaint that the educational courses authorized under Section 8506 of the Education Code deny and deprive plaintiffs or their children of the right of privacy of mind in that they are required to reveal their personal and private feelings to teachers and fellow students.

And further, that such courses are an invasion of personal and family privacy and an interference with and usurpation of parental authority. That all of such conduct is contrary to the plaintiffs' rights as guaranteed by the Fourteenth Amendment of the United States Constitution and further is guaranteed by the Ninth and Tenth Amendments of the United States Constitution and Article I, Section 1, of the Constitution of the State of California.

As previously pointed out, plaintiffs' children are simply not required to even attend such courses if such be the desires of their parents. As pointed out in the case of *Cornwell v. State Board of Education,* 314 F.Supp. 340, at Page 342, that court stated "The plaintiffs further assert that they have the exclusive constitutional right to teach their children about sexual matters in their homes, and that such exclusive right would prohibit the teaching of sex in the schools. No authority is cited in support of this novel proposition, and this court knows of no such constitutional right. This court then, is satisfied that the claims asserted in this complaint under the Fourteenth Amendment are so insubstantial that they do not confer jurisdiction here". This decision, incidentally, was affirmed by the Fourth Circuit Court of Appeals in 428 F. Supp. 471 and a hearing was denied by the United

States Supreme Court. It is the view of this court that the complaints of the plaintiffs in the case before this court are substantially less in nature for the simple reason that the plaintiffs, or their children rather, are given the particular right to be excused from the sex education and family life programs if they feel that such participation would result in a violation of their privacy of mind or invade their personal or family privacy or in any way interfere with parental authority in such areas.

Finally, the plaintiffs urge that they are denied equal protection of the law because some burden is placed upon the parents or guardians to make a choice, namely of having their children who are not to participate in such sex education or family life classes, and that this in turn forces a separation of students from regular classes and in turn results in a discrimination between similarly situated parents and guardians and between similarly situated students.

This contention is totally without merit because the decision as to whether or not their children will participate and associate rests solely with the individual parents in making a determination as to whether they want their children to participate in such classes or not. Thus, there is no improper state action in the constitutional sense which seeks to discriminate or preclude plaintiffs' children from participating in such classes and thus deny equal protection or improper discrimination. The whole thrust of the plaintiffs' lengthy complaint is simply directed to alleged constitutional contentions that the sex education

courses and family life study course violate various so-called constitutional rights of the plaintiffs. As heretofore pointed out, this court is of the view that accepting the various allegations of the plaintiffs' complaint to be true, the plaintiffs have failed to raise any substantial constitutional issues or any factual issues and accordingly, the defendants' motion to dismiss the entire complaint is granted.

The plaintiffs simply seek to permanently and totally enjoin sex education in the public school system. They do not urge that such a program in any way violates any state law, but the sole basis of their contention rests upon their so-called constitutional rights. Absent some serious contention of harm to the mental or physical health of the children of this state or to the public safety, peace, order or welfare, a mere personal difference of opinion as to the curriculum which is taught in our public school system does not give rise to a constitutional right in the private citizen to control exposure to knowledge.

The Supreme Court of the United States has resolved the question of the right of the various states to offer sex education and family life programs for their students. It is the view of this court that the quality and content of such courses are better left with the elected representatives of the people, be they the state legislature, school board members or individual school trustees. Motion to dismiss is granted.

Dated: This 9th day of January, 1973.

/s/ Robert D. Carter
Judge of the Superior Court